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APPLICATION OF RULES OF EVIDENCE TO FACT-FINDING BOARDS

URBAN R. MILLER*

BASED upon the experience of mankind, law comprehends neither scientific certitude nor objective truth. But in compromising on an approximation of fact, the law is accountable to a complexity of method unknown to the seeker after pure truth. The fickle uncertainties of human nature explain the attainment of legal certitude only by means of exhaustive series of rules and exceptions to rules. So the moralist, the scientist, and the logician point the jurist to the anomaly that despite his elaboration of method for determining fact, usually the issue in dispute is not the truth or falsity of facts, but the more substantive question of truth or falsity of conclusions.¹

This complex method of proof, with its rules, exceptions to rules, and exceptions to exceptions is the product of the jury-trial method of fact determination.² But like all institutions that live on accumulation of precedent, the sin of self-exploitation has encumbered its efficiency.

The establishment of fact-finding bodies to improve upon the lay jury system came with the great modern social and economic changes. The twelve good men and true of the vicinage were not uniformly orientated to the new type of problems. Unadaptability of the temper of the common law system of proof to the solution of social problems, and the consequent distrust of the jury system, resulted in modification by the creation of specialized fact-finding tribunals which are fulfilling an ever-increasing demand.

Specialized fact-finding bodies have replaced the jury in two respects. First, we have fact-finding juristic experts, such as referees and special masters, who are adjuncts of the courts. Second, we have administrative tribunals separated from the courts in their fact-finding duties, but designed to relieve the courts from consideration of a great mass of technical detail.³

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¹ Carl McFarland, "Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations," 20 A.B.A. Jour. 612.

² J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown, & Co., Boston, 1898), Chs. 4-6, pp. 180, 266, 270, 509.

³ Administrative tribunals may be divided into four general classes: (1) Those with jurisdiction over purely technical matters, (2) those with jurisdiction over lay subjects, (3) those with jurisdiction over semi-technical subjects, (4) those with

It is, however, to the latter that this discussion is devoted, since it is those tribunals which have departed most markedly from the legal rules of evidence, and threaten to found a new method of fact ascertainment from which the anachronisms and cobwebs of the common law will be discarded.⁴

When we approach consideration of the application of the jury-trial rules of evidence by our modern fact-finding bodies, we find the origin and policy of such rules obscured by historical precedents of the common law. Therein lies the fundamental distinction already suggested, since at common law the ascertainment of fact has been inseparably identified with the lay jury system.⁵ In the early history of administrative law, the natural order was to observe the legal rules of evidence.⁶ As a result this historical anomaly has long existed, and has only recently begun to give way to socialized concepts. The lawyer is trained in the uncompromising absolutism of the jury-trial rules; and so the orthodoxy of precedent yields but stubbornly to the pressing needs of the times which demand a practical distinction between common-sense truth and legal truth,⁷ and the consequent further creation of business-like organizations designed to adjudicate complicated and technical questions in a business way.⁸

When we bring the question of policy down to date, we must arrive at a compromise between two diametrically opposed views, either of which goes to the extreme of arbitrariness and caprice in the hands of its most ardent advocates. The legalistic

semi-political, or a fusion of judicial and legislative, jurisdiction over questions of public policy.

⁴ *Wichita Railroad & Light Co. v. Court of Industrial Relations*, 113 Kan. 217, 214 P. 797 (1923). But note the following: "And the trouble also lies in creating an administrative tribunal which is complaining witness, *ex parte* prosecutor, grand jury, *inter partes* prosecutor, jury and judge, to issue an order affecting the conduct of a citizen's business." Frank B. Fox, "What about Administrative Tribunals?" 21 A.B.A. Jour. 376. However, consistency in reasoning would recognize a distinction between administrative tribunals which have jurisdiction over questions involving only private parties and administrative tribunals which have jurisdiction over questions in which a private party and the public are involved. See discussion by F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263 at 265.

⁵ *Berkeley Peerage Cases*, 4 Camp. 401 at 415, 171 Eng. Rep. 128 at 135.

⁶ Wigmore, *Evidence* (2d ed.), I, § 4b, p. 24.

⁷ P. G. Phillips, "A Practical Method for the Determination of Business Fact," 82 U. of Pa. L. Rev. 230.

⁸ F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263.

view is that the jury-trial system of rules, founded upon caution born of experience, cannot be dispensed with, either constitutionally or with any degree of safety.⁹ It is contended that expedient judicial review would be impossible without resort to the criterion by which probative fact is evaluated, and that therefore procedure that is workable in one kind of tribunal is workable in another.¹⁰

The other is the lay view. Rules of exclusion, it is said, are irrational in fact determination.¹¹ And so its proponents point to the success with which juvenile courts, domestic relations courts, workmen's compensation commissions, and the Interstate Commerce Commission have conducted their inquiries without adhering to the legal rules of evidence.¹² With these bodies rules of exclusion are rare; only rules deemed fundamental and essential to due process are observed.¹³

There is much to recommend both views, and probably as much to condemn them. The lay view is based upon the fallacious generalization that since certain tribunals have dispensed justice without regard to the legal rules, all tribunals can do likewise.¹⁴ But conditions differ within the various kinds of tribunals, whereas the jury-trial rules represent the accumulation of human experience for all time and conditions. And yet the jury-trial rules have become so technical that reversals by appellate courts are tending to become the rule rather than the exception. Despite the extreme over-conservatism in the matter of admission of evidence, false verdicts are every day being rendered and allowed to stand.¹⁵

⁹ Although written for another question, no bit of philosophy is more pertinent than Justice Holmes's line in *New York Trust Co. v. Eisner*, 256 U.S. 345 at 349, 41 S. Ct. 506 at 507, 65 L. Ed. 963 (1921): "Upon this point a page of history is worth a volume of logic."

¹⁰ Wigmore, *Evidence* (2 ed.), I, § 4b, p. 28.

¹¹ *Ibid.*, p. 27.

¹² Bartlett, "The New Justice," 126 *Atlantic Monthly* 296.

¹³ *Svarney v. U.S.*, 7 F. (2d) 515 (1925).

¹⁴ Wigmore, *Evidence* (2d ed.), I, § 4b, p. 29.

¹⁵ With characteristic frankness, Dean Wigmore has said: "A third thing to remember is that the jury-trial system of Evidence-rules cannot be imposed upon administrative tribunals *without imposing the lawyers upon them also*; and this would be the heaviest calamity. The complex mass of Evidence-rules cannot be applied except by technically trained lawyers; and, furthermore, many of these technical lawyers will belong to the over-technical type. No one can wish that the petty snarling contentiousness over technicalities of trial tactics, so typical of jury-trial, should be transferred to the administrative tribunals. And yet, how can the system be transferred without transferring the only persons who can use it? Sermonize as we may on the wisdom of the system in the abstract, it cannot be used in the abstract; and in the concrete it reeks of futile professional contentious-

As a whole, the jury-trial rules of evidence serve their purpose in guiding an ill-assembled group of inexperienced jurymen, whereas administrative tribunals are presided over by men who are experts in the particular field of inquiry. Hence, while accepting the system as a whole, we cannot but brand as irrational, obstructive, and overly cautious certain individual rules. This difficulty may be dissolved by transplanting the system *in toto*, minus its objectionable features, from its native habitat to the new field of administrative law.

Attempt at solution of these preliminary questions leads us toward a compromise somewhere between the two extremes of being shackled by out-worn rules and being bound by no rules at all. This compromise the New York courts sought in the classic case of *Carroll v. Knickerbocker Ice Company*,¹⁶ wherein the residuum rule was promulgated. In this decision it was held that, at the hearing, the administrative tribunal need not be bound by the jury-trial rules. It could thus summarily disregard all the legal rules of exclusion and admit evidence freely and liberally. But those rules would control the mental process of weighing the great volume of evidence so freely received, and require that in it there be sufficient competent probative evidence to sustain the findings.¹⁷

At first glance the liberalizing tendency of this rule appears to be a step in the right direction. Its ultimate effect, however, is to arrive back at the starting point, inasmuch as it requires elimination from consideration of the very sort of proof upon which the myriad affairs of the world are daily conducted. It

ness. Yet one of the universally desired objects in vesting the powers of decision over new industrial and commercial problems in modern administrative boards was to avoid hampering them with the technical methods enforced by the judges in jury-trials; the language of the legislative enactments demonstrates this plainly. A survey of the practice in different States before such boards gives the impression that their failure or success in this respect may be fairly measured by the extent to which the professional assistance of lawyers has or has not continued to be necessary before them as formerly before the jury-courts. Certainly, then, to impose the Evidence-rules on administrative tribunals will inevitably mean the imposition also of the handicap of a professional body of lawyers to conduct the practice." Wigmore, *Evidence* (2d ed.), I, § 4b, pp. 30, 31.

¹⁶ 155 N.Y.S. 1 (1915), reversed with two judges dissenting, 218 N.Y. 435, 113 N.E. 507 (1916).

¹⁷ See also *Spiller v. Atchison, T. & S.F. R. Co.*, 253 U.S. 117, 40 S. Ct. 466, 64 L. Ed. 810 (1920); *U.S. v. Abilene & S. Ry. Co.*, 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924); *Federal Radio Commission v. Nelson Bros. B. & M. Co.*, 289 U.S. 266, 53 S. Ct. 627, 77 L. Ed. 1166 (1933), where it was said: "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law."

still virtually requires the fact-finding body to use the jury-trial rules as a criterion; and it reiterates and readopts the specious assumption upon which the evil of the legal rules rests—that there is some reliable and logical relation between the observance of the rules and the accuracy of the finding. The rule goes even further afield. It says in effect that the evidence which conforms to the legal requirements is credible, whereas that which is not so blessed is not credible.¹⁸ The paramount purpose of the rule appears to be to allow the tribunal to weigh all evidence carefully for competency before weighing it for probative worth.

Fortunately, as a compensating development, the spirit of compromise appears more often to separate irreconcilable principles of substantive law, and constantly influences our contentious system of procedure. Hence, the failure of the compromise on the residuum rule to provide a workable system should not deter us from seeking other compromises between the over-conservatism of the legal rules and modern social and economic needs. An ideal would be one most frugal of the wisdom of the common law, and at the same time open to adoption of rules dictated by our changing world. Obviously, such a system would be predicated upon the legal rules as a whole, with modification and simplification of rules that are now antiquated and purposeless.

The difficulty lies not alone with the rules themselves, but in their abuse as well.¹⁹ This is an unfortunate result of the spirit of our contentious method of procedure, in the use of which the bar is sometimes shortsighted enough to forget that an advocate's duty is to see that justice is done, not to win ingloriously at the expense of the law's shortcomings. Behind that is what has been so aptly termed "undue servitude to the bondage of precedent" and a "fetish of immutability,"²⁰ for a rule once promulgated is thenceforth supreme law, to be applied doggedly without critical review and regardless of policy. Objecting counsel is not required to show, or even avow, before a rule is invoked, that an actual violation of right will result from its non-enforcement.²¹ Magnification of unimportant error into reversi-

¹⁸ Wigmore, *Evidence* (2d ed.), I, § 4b, pp. 32-4.

¹⁹ *Ibid.*, § 8a, p. 127.

²⁰ *Ibid.*, § 8a, p. 117.

²¹ P. G. Phillips, "A Practical Method for the Determination of Business Fact," 82 U. of Pa. L. Rev. 230 at 232.

ble error renders the law of evidence as a whole entirely too rigid.²²

The remedy is partially suggested by the statement of the defect. A rearrangement of our conception of the administration of justice so as to subordinate the rule of law *per se* to the higher exigencies of the situation is the inevitable suggestion.²³ Thus, greater discretion in the trial or fact-finding body as to applicability of rules of evidence to the issues in dispute would lead to that practical flexibility requisite to the administration of justice. Too often in the hands of a reviewing tribunal a concrete situation full of human actualities becomes a mere abstract proposition of law. Every opportunity should be afforded the lower or administrative court to apply its own correctives and to neutralize then and there for all time the effect of improper evidence.

When we come to a consideration of the specific question of the extent to which fact-finding boards should be bound by rules of evidence, we see more concretely the need for liberalization and restatement of such rules. The difficulty of proof incident to the subjects assigned these bodies necessitates an approach that inquires first, what facts are needed, and second, how the rules of evidence may be adopted to that end.²⁴ In no event, of course, can the constitutional requisites of due process be ignored.²⁵ Likewise, any thought of curtailing or encumbering the process of judicial review of questions of law is too far contrary to deep-seated tradition to be lightly tolerated.²⁶ To these tests, therefore, must any attempted solution of the general problem be subjected.²⁷

²² Wigmore, Evidence (2d ed.), I, § 8a, pp. 128 et seq.

²³ Fronsdaal v. Civil Service Commission of Des Moines, 189 Iowa 1344, 179 N.W. 874 (1920).

²⁴ F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263 at 265; P. G. Phillips, "A Practical Method for the Determination of Business Fact," 82 U. of Pa. L. Rev. 230 at 232.

²⁵ U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54, 68 L. Ed. 221 (1923); Svarney v. U.S., 7 F. (2d) 515 (1925); Wigmore, Evidence (2d ed.), I, § 4a, p. 22.

²⁶ Even the prerogative remedies of injunction and mandamus are available in judicial review. State ex rel. Brewster v. Mohler, 98 Kan. 465, 158 P. 408 (1916). But compare the following: "One of the most persuasive arguments against a too generous employment of the right to a judicial review is the fact that courts are not equipped to review findings of fact in many technical fields." M. Rosenberry, "Administrative Law and the Constitution," 23 Am. Pol. Sci. Rev. 32 at 42 (1929).

²⁷ Federal Radio Commission v. Nelson Bros. B & M. Co., 289 U.S. 266, 53 S. Ct. 627, 77 L. Ed. 1166 (1933); Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598

Fact-finding boards are, or should be, first of all composed of experts in the field of inquiry. Continued experience that comes from long and secure tenure of service enhances expertness, and enables the board to determine questions of fact accurately on much less or different evidence than is necessary to move an unskilled jury past first presumptions.²⁸

The choice then lies somewhere within (1) freedom from *all* rules of evidence, (2) freedom from the restraint of *purely technical* rules of evidence,²⁹ and (3) freedom from rules which are today patently irrational.

Although the first choice finds ready acceptance here and there, it is impossible;³⁰ we are unwilling to legislate away the accumulation of centuries of experience, even for the exigencies of administrative law.³¹ In the language of the average judge and lawyer, we find a great deal of truth: "If these boards and commissions are going to hold court, let them conduct themselves as courts." So the proposal can be discarded summarily in favor of a compromise.

Involved in the next plan is the prerequisite determination of what, if any, are *purely technical* rules of evidence. Is the rule against the admission of hearsay evidence a purely technical rule? This rule is maligned by more exceptions than probably any other rule of law, which suggests to many students that

(1932), restricting the right of review to questions of law. But compare this statement: "Where the legislature has created these commissions and given them final power to pass on questions of fact, with a review by the courts on questions of law alone, courts should be most reticent in upsetting the finding of the administrative where there is any fact produced, tending to support the finding of the commission." F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263 at 270. Compare also the suggestion that a purely administrative appellate tribunal may well serve the purpose. Carl McFarland, "Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations," 20 A.B.A. Jour. 612.

²⁸ F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263 at 265.

²⁹ In *Liquid Carbonic Co. v. Industrial Commission*, 352 Ill. 405, 186 N.E. 140 (1933), it was held that although the decision of an arbitrator or commission must be founded on legally competent evidence, a mere disregard of the common law technical rules governing the method of production and hearing of evidence and the examination of witnesses is not sufficient to set aside such an award.

³⁰ Attempts at interpretation and application of statutes freeing administrative commissions from statutory and common law rules of evidence have ended in much the same way as the *Knickerbocker Ice Co.* case. See discussion of these cases by F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263 at 276-84.

³¹ Wigmore, *Evidence* (2d ed.), I, § 4b, pp. 34, 35, wherein he analyzes the proposal for administrative tribunals. Compare, however, § 8a, p. 124, where he discusses the same procedure for the judiciary.

it must be more technical and arbitrary than any other rule, or that it is *the only purely technical rule*. It has been held, however, that the hearsay rule is not a technical rule, but one that is grounded upon sound principles of the common law.³² The bases for the decisions so holding are as follows: (1) The absence of the sanction of an oath, (2) no opportunity afforded the adverse party for cross-examination, (3) opening up immaterial collateral issues.

With temporary disposition of this preliminary question on the hearsay rule, we come to consideration of fundamental rules which are deemed as not technical but partially irrational in their application to adjudication of modern problems.

BURDEN OF PROOF AND PRESUMPTIONS

The rule that the burden of proving the allegation is on the proponent, and that the burden of going forward with the proof shifts back and forth, is one of the most logical and intrinsically sound rules of adjective law. In this field the situation is always the same, in every kind of court and every kind of case. In the mental process of weighing the proof against abstractions even expert fact-finders are sometimes confused and at a loss to know how to proceed under artificial extraneous instructions. So also a misconception results when rules of exclusion prevent the plaintiff from offering evidence toward discharge of the burden. The consequent injustice is improperly attributed to the rule of burden of proof, rather than to the rules of exclusion. Simple direct mental weighing is the process by which liberty and property are daily affected in our varied human relations and is the process upon which all historical truth is predicated.³³

Likewise, the application of presumptions, other than those that assist in defining burden of proof, result in confusion. Some of them actually seek to shift the burden of proof at the very outset to the defendant.³⁴ For instance, many workmen's compensation acts provide that in an action against an employer who has rejected the act, the presumption shall be that the injury was

³² *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 P. 421 (1915); *Employers' Assurance Corporation v. Industrial Accident Commission*, 170 Cal. 800, 151 P. 423 (1915); *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 P. 24 (1915); *Reck v. Whittlesberger*, 181 Mich. 463, 148 N.W. 247 (1914).

³³ Wigmore, *Evidence* (2d. ed.), I, § 8a, p. 146.

³⁴ F. A. Ross, "The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions," 36 Harv. L. Rev. 263 at 271-4.

the result of the employer's negligence, and that he must thereupon assume the burden of proof to rebut the presumption.⁸⁵

HEARSAY AND CIRCUMSTANTIAL EVIDENCE

Probably the point at which there is greatest divergence between the more everyday method of fact ascertainment as exemplified in the law of evidence of other countries, and the Anglo-American system of evidence, is in the value of hearsay evidence.⁸⁶ Our law has been very jealous of secondary evidence and most insistent upon the primacy of evidence produced by rules of exclusion. With seventeenth century perspective our jurisprudence followed our determination to prevent abuses that had been suffered under the early common law, and we accordingly adopted the abstract theory that the more difficult the burden of proof or the burden of going forward with the proof, the less likelihood of the law disturbing the *status quo*.

When we have devised a competent substitute for cross-examination of witnesses, we shall have laid the foundation for changes in the hearsay rule as thoroughgoing as the most liberal critic could desire. The right to cross-examination is fundamental, inalienable.⁸⁷ It is construed in every bill of rights; it is the one trial weapon wielded with an approach to a maximum of scientific precision. So it is not likely to be discarded for any reapplication of the rule against hearsay. But with all the resources that unrestricted use of cross-examination puts at one's command, secondary evidence need not be excluded entirely but can be admitted to stand or fall on its own probative merit.

Dean Wigmore would retain this vital feature of the hearsay rule, but would have the rule modified: (1) By liberalizing its application to former testimony and depositions; (2) by admitting relevant statements made by persons now deceased;⁸⁸ (3)

⁸⁵ *Hawkins v. Bleakly*, 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 679 (1917). In this case it was held that it is within the province of a state to give effect to the salutary purpose of a Workmen's Compensation Act by setting up presumptions which affect the burden of proof, as long as such presumptions are not unreasonable or conclusive of the rights of the parties. Accord: *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Shea v. North-Butte Mining Co.*, 55 Mont. 522, 179 P. 499 (1919).

⁸⁶ Wigmore, *Evidence* (2d ed.), I, § 8a, p. 127.

⁸⁷ *The Ottawa v. Stewart*, 70 U.S. (3 Wall.), 269, 18 L. Ed. 165 (1863); *Svarney v. U.S.*, 7 F. (2d) 515 (1925); Wigmore, *Evidence*, III, § 1367, pp. 26-30.

⁸⁸ Accord: *Shell Co. v. Industrial Accident Commission*, 38 Cal. App. 463, 172 P. 611 (1918); *State Compensation Insurance Fund v. Industrial Accident Commission*, 195 Cal. 174, 231 P. 998 (1924).

by removing all exceptions to the dying declaration rule; (4) by allowing proof by simple official certificate; (5) by removing the intricate network of exceptions to statements of mental or physical condition; (6) by allowing narration of spontaneous exclamations to be made in such a manner that suspicion does not surround every word; (7) by permitting qualified witnesses to narrate in direct conversational language without the exclusion of essential details by the rule against hearsay.³⁹

These suggestions by the great master of the law of evidence are truly constructive. Although offered primarily for the purposes of jury-trial, need we go further for the purposes of administrative law?

With similar caution we have guarded our rights from the mutations of circumstantial evidence. It was not until we recovered from the shock caused by the departure of administrative tribunals from the accepted jury-trial rules that we realized fully that circumstantial evidence could carry unerring conviction. The courts sought to check the threatened evil of such a deviation from precedent, by the doctrine that the conviction produced by circumstantial evidence must not be the result of mere guess, conjecture, or surmise⁴⁰ "of a choice between two views equally compatible with the evidence."⁴¹ Indefinite as this guide may seem to be, it is nevertheless the restatement of basic common sense. It still leaves a wide field for liberality in adjective law. Hearsay evidence fortified by circumstantial evidence should certainly be trustworthy. No suggestions of chance coincidence can throw such a situation into the realm of improbability.⁴²

EX PARTE INVESTIGATIONS AND TESTIMONY

Autoptic Proference

The case of the arbitrator who was chastised by the court for seeking extra-legally to determine the marketability of merchandise by offering it for sale in the market, has become a classic example of degeneration of our adjective law. This is what

³⁹ Wigmore, Evidence (2d ed.), I, § 8a, pp. 136-9.

⁴⁰ Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N.E. 651 (1917); Peoria Cordage Co. v. Industrial Board of Illinois, 284 Ill. 90, 119 N.E. 996 (1918).

⁴¹ Liquid Carbonic Co. v. Industrial Commission, 352 Ill. 405, 186 N.E. 140 (1933).

⁴² Johnston v. Payne-Yost Construction Co., 292 Pa. 509, 141 A. 481 (1928).

actually happened in *Stefano Berizzi Company v. Krausz*.⁴³ By the doctrine of this case we are led to the conclusion that, in some courts at least, the pendulum has swung too far from the ancient common law rule that the testimony of the parties to the controversy was incompetent. The rule in this case implies that the only competent evidence is that adduced at the behest of the litigating parties themselves. Too often the scales are balanced back and forth on the same issue, while the court, the jury, the commission, the arbitrator—the fact-finding functionary—sits helplessly by, unable to determine the facts by pertinent matters which neither party is willing to hazard in evidence.⁴⁴ If such a sortie is indulged in, it must indeed be a clandestine proceeding. And yet there are countless instances where even an approximation of truth is difficult without an outside investigation. It is the method of historians and scientists. The right of the parties to cross-examine on any evidence received in this manner would be amply protective.

Autoptic preference of an object or of a place to a jury out of court is permissible only under the most restricted conditions. A strange commentary on our law is that when a jury is taken to view a place in question, it is expected to see only that which it is told to see.⁴⁵ But in the case of a trained observer making an impartial investigation of all pertinent facts for an expert fact-finding body of which he is a member, there is no need for narrow rules excluding from the physical senses facts which are competent and material in consideration of human problems by other agencies. The successful manner in which domestic relations courts, juvenile courts, and the Interstate Commerce Commission, for instance, have used evidence gathered through *ex parte* investigations indicts mere unreasoning opposition, and recommends this type of evidence to our socialized tribunals.⁴⁶

⁴³ 239 N.Y. 315, 146 N.E. 436 (1925).

⁴⁴ The *Stefano Berizzi Company* case is discussed by P. G. Phillips, "A Practical Method for the Determination of Business Fact," 82 U. of Pa. L. Rev. 230 at 232 et seq.

⁴⁵ "If a sensible man wants to make sure whether a window is broken or a house burned down, he puts on his hat and goes out and sees for himself what the fact is. But our Courts seem to regard a jury's view as if it were an act which would expose jurors to an infectious disease or a moral contamination." Wigmore, Evidence (2d ed.), I, § 8a, p. 135.

⁴⁶ But cf. *Baltimore & O. R. Co. v. U.S.*, 264 U.S. 258, 44 S. Ct. 317, 68 L. Ed. 667 (1924); *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924). In these cases it was held that facts within the knowledge of the Interstate Commerce Commission, but not formally put in evidence in the particular

There is a great difference between haphazard *ex parte* investigation and the methodical assembling of evidence by trained experts.

Ex parte oral testimony by the ordinary witness is, however, another thing. It is submitted that such procedure runs afoul of the best of the rule against hearsay,⁴⁷ and is violative of our due process clauses.⁴⁸ In some respects competent oral testimony subjected to cross-examination is at the best only secondary evidence. By means of autoptic proference a thing speaks for itself, not through the incongruities of human communication.

Another aspect of the question was considered in *Kaw Valley Drainage District v. Missouri Pacific Railway Company*.⁴⁹ Here the Kansas court went even farther than the most forward-thinking students of administrative law had theretofore anticipated and expressed the view that administrative tribunals are policy-forming bodies—that by liberating them from the legal rules of evidence, their quasi-judicial pronouncements can be made accountable to popular will. The court said:

Another contention of defendant is that it did not receive due consideration from the plaintiff's board before the order for the removal of the bridge was issued, and that the members of the board made the order pursuant to pre-election promises that they would not tolerate any bridge across the river having more than two piers. The circumstances were unusual. . . . In any matter of such general interest as flood protection in Kansas City, it would be asking entirely too much of mere laymen to keep their minds open and uncommitted on such matters likely to come before them later for official consideration. Lawyers and judges trained in the art of jurisprudence, which requires a suspension of the judgment until all sides of a controversy have been fully considered, can do this; but if such high standards of mental neutrality are absolutely essential to qualify for membership in administrative boards, the whole system of administering government functions by boards and commissions of laymen will fail. The remedy for such prejudgments is not wanting, however. The redress of such grievances is usually taken care of when the courts are called on to test the reasonableness of the official orders of these boards.

proceeding, will not support an order. See *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

⁴⁷ *Carstens v. Pillsbury*, 172 Cal. 572, 158 P. 218 (1916); *Bereda Manufacturing Co. v. Industrial Board of Illinois*, 275 Ill. 514, 114 N.E. 275 (1916); *Ruda v. Industrial Board of Illinois*, 283 Ill. 550, 119 N.E. 579 (1918); *Gauthier v. Penobscot Chemical Fiber Co.*, 120 Me. 73, 113 A. 28 (1921); *Earle's Shipbuilding & Engineering Co. v. Walker*, [1917] W. C. & Ins. Rep. 54.

⁴⁸ *Kwock Jan Fat v. White*, 253 U.S. 454, 40 S. Ct. 566, 64 L. Ed. 1010 (1920).

⁴⁹ 99 Kan. 188 at 210, 161 P. 937 at 947 (1916).

EXPERT WITNESSES AND OPINION EVIDENCE

Theoretically the opinion of an expert is supposed to be well nigh unimpeachable. And yet perversions of the use of expert opinions have become so common that we have lost a great deal of respect for this type of evidence. Rare indeed is the contested case in which the testimony of experts is given, that the fact-finding body is not obliged either to find directly to the contrary of the testimony of one or more experts, or to reconcile their extremely antipodal views.⁵⁰ When experts differ so greatly on the issue, the tendency must be toward not only a loss of respect for the lay testimony adduced, but loss of respect for the very proceeding itself. Only a fact-finding body composed of experts in the field of inquiry, and which is at liberty to proceed with its own independent investigation, is able to evaluate properly the conflicting opinions of experts.

While Dean Wigmore would retain the requirement that an expert be qualified by special experience, he would at the same time allow the ordinary lay witness to state an inference, or describe his impression, based upon personal observation of a nontechnical matter.⁵¹ Almost any person can form and express an adequate opinion on safety, care, negligence, reasonableness, character, sobriety. Such an opinion on a minor non-technical issue, if bona fide, should be of effective assistance to a fact-finding body of technicians. However, it is sometimes rather difficult to believe that this sort of opinion evidence would not soon go the unfortunate way of expert opinions. Lay witnesses are no less susceptible to the human frailty of bias and prejudice than are experts.

In no event, however, should liberalization of rules of evidence amount to a disregard of substantive law.⁵² While it is sometimes difficult to determine whether a rule is one of substantive or adjective law, as, for example, in the case of the parole evidence rule, tests of basic purpose should be applied. The

⁵⁰ A case within the personal knowledge of the writer is too illustrative of the point to be kept. In this case, in which the issue was the value of a corner lot, five so-called realty evaluation experts testified—two for the plaintiff and three for the defendant. Their opinions as to the value of the lot in question ranged from \$1,600 to \$27,500! Almost any unbiased man in town—laboring man, business man, or professional man—could have, either from personal knowledge or upon a little investigation, given a more accurate opinion.

⁵¹ Wigmore, *Evidence* (2d ed.), I, § 8a, pp. 140-2.

⁵² *Liquid Carbonic Co. v. Industrial Commission*, 352 Ill. 405, 186 N.E. 140 (1933).

simplest of these is that if the rule is considered by a court in reaching its ultimate decision, it is one of substantive law, but that if it merely prevents oral testimony from being admitted, it is a rule of adjective law.⁵³ That administrative tribunals should interpret or construe independently more than a modicum of substantive law is a suggestion too far-fetched to require present consideration. Their role is expediency in procedure.⁵⁴ The English practice in arbitration proceedings of providing for court instruction of arbitrators on the law to be followed in their decisions on the facts, contains some assurance that the law as administered by the arbitrators will be the law of the land.⁵⁵ Why, then, should any fact-finding body in discovering facts be handicapped by rules of exclusion, and yet be allowed full play in making decisions on substantive law?

⁵³ P. G. Phillips, "A Practical Method for the Determination of Business Fact," 82 U. of Pa. L. Rev. 230 at 243-4.

⁵⁴ "On the other hand, law and administration are to some extent antagonistic institutions of government. The one is interested in regularity and the protection of private rights, the other in getting something done. The judges are trained in the tradition of the common law, while administrators deal in highly technical matters of comparatively recent origin." Carl McFarland, "Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations," 20 A.B.A. Jour. 612 at 613.

⁵⁵ *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K. B. 478.